DATO' AHMAD YUNUS

v.

KERAJAAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[ORIGINATING SUMMONS NO: S6(S2)-21-96-1999]
8 NOVEMBER 2001

LABOUR LAW: *Pensions - Pension adjustment benefit - Entitlement and requirements - Resident of Malaysia - Pensioner obtaining UK permanent residence and staying there for many years - Whether pensioner ceased to be a resident of Malaysia - Whether pensioner intended to reside in UK permanently - Whether entitled to adjustment benefits - Special circumstances - Pensions Adjustment Act 1980, ss. 1(2) & 2*

PUBLIC SERVANTS: *Pensions - Pension adjustment benefit - Entitlement and requirements - Resident of Malaysia - Pensioner obtaining UK permanent residence and staying there for many years - Whether pensioner ceased to be a resident of Malaysia - Whether pensioner intended to reside in UK permanently - Whether entitled to adjustment benefits - Special circumstances - Pensions Adjustment Act 1980, ss. 1(2) & 2*

WORDS & PHRASES: *"Resident of Malaysia" - Pensions Adjustment Act 1980, s. 2*

The plaintiff retired from the civil service on 25 November 1983 whereupon he had reached the age of 55 and had served the government for 32 years and ten months. Immediately upon his retirement the plaintiff was posted to the Palm Oil Research Institute of Malaysia ('PORIM') in the UK as a consultant. The plaintiff left PORIM on 30 September 1991 but continued to stay in the UK and thereafter obtained permanent resident status in the UK because his children were studying there. Although he was staying in the UK, the plaintiff continued to receive the full pension adjustment benefits under the Pensions Adjustment Act 1980 ('the Act') until 1 December 1997 when the government withdrew the same. It was contended on behalf of the government that to receive such adjustment benefits the pensioner must be a "resident of Malaysia" as defined in s. 2 of the Act, and the plaintiff having ceased to be a "resident of Malaysia" – because he had been residing in the UK indefinitely, had UK permanent resident status, and had stayed away from Malaysia for more than six months – was not entitled to receive such adjustment benefits anymore. The instant application by the plaintiff was for a declaration that he was a "resident of Malaysia" within the meaning of ss. 1(2) and 2 of the Act and was therefore entitled to the said adjustment benefits.

Held:

[1] A person's status as a "resident of Malaysia" under the Act must be decided on the very particular facts and circumstances of his case. Staying away from Malaysia for more than six months does **not** automatically or invariably derogate from one's status as a "resident of Malaysia". There is no such time limit prescribed by the Act. The primary consideration in deciding whether a person has lost his status as a "resident of Malaysia" is whether he **intends** to reside in another country **permanently**. In the instant case the plaintiff had no intention to reside in the UK permanently and would return to Malaysia with his family upon the completion of his children's education thereat. (pp 544 i & 545 a-d)

[2] In addition, there were also special circumstances in the plaintiff's favour. Immediately upon his retirement the plaintiff was asked by the government to work for PORIM in the UK to safeguard the nation's interests, *viz*, to counter certain elements of misinformation emanating from the US against Malaysian palm oil. And it was because the plaintiff had to work in the UK for a reasonably long time that he brought his wife and children along, and obtained permanent resident status in the UK to facilitate his children's education thereat which he otherwise might not have been able to afford. The plaintiff's employment at PORIM ended in 1991 but he had to continue staying in the UK as a permanent resident to enable his children to complete their education there. Therefore, since the plaintiff's initial stay in the UK was at the behest of the government and was in the nation's interests, he should not be penalised for obtaining permanent resident status in the UK. It would be unfair and unjust to deny him his pension adjustment benefits. (pp 545 e-i & 546 a)

[Application allowed.]

Case(s) referred to:
K Thomas & Anor v. Kerajaan (R2-25-22-1995) (unreported) ***(dist)***

Legislation referred to:
Pensions Adjustment Act 1980, ss. 1(2), 2

For the plaintiff - N Sivananthan; M/s Sivananthan
For the defendant - Mohamad Naser Disa SFC

Reported by Gan Peng Chiang

JUDGMENT

Azmel Maamor J:

In this application the plaintiff sought a declaration that he, for the purpose of s. 1(2) and s. 2 of the Pensions Adjustment Act 1980, is a "resident of Malaysia" and therefore entitled to all adjustments made and/or to be made in favour of pensioners resident in Malaysia under the Act.

The plaintiff had served the government for a continuous period of 32 years and ten months. He retired from government services on 25 November 1983 upon reaching the age of 55 years. Immediately upon his retirement he was sent to Hertford, United Kingdom to work as a consultant with the Palm Oil Research Institute of Malaysia (PORIM) at its laboratory at Makmal Tun Razak. He left the job on 30 September 1991. However the plaintiff continued to remain in the United Kingdom mainly because his children were still studying in that country. It was solely for that purpose he obtained a permanent resident status in the United Kingdom. However it had always been his intention to return to Malaysia as soon as his two children completed their studies in the United Kingdom. It would appear therefore that his stay in the United Kingdom would determine upon the completion of his two children's education in that country.

On his retirement the plaintiff, even though staying in the United Kingdom, was accorded the full pension adjustment benefits of the Pensions Adjustment Act 1980. He continued to receive the same until 1 December 1997 when the government withdrew such pension adjustment benefits. It was a requirement of the said Act that in order for a pensioner to enjoy such pension adjustment benefits he must be a "resident of Malaysia". With the withdrawal of such benefits the plaintiff's monthly pension was reduced by RM610. It was for that reason that the plaintiff brought this action to court. The only issue for determination is whether or not the plaintiff had lost his "resident of Malaysia" status while staying in the United Kingdom.

The term "resident ot Malaysia" is defined in s. 2 of the said Act. It reads as follows:

> 'resident of Malaysia' means being habitually resident in Malaysia as evidenced by the person concerned having his sole and principal place of abode in Malaysia and residing therein for such period or periods of time as is inconsistent with the continuity of residence in Malaysia and as point to durable ties between him and Malaysia.

The defendant gave three reasons why the plaintiff had ceased to be a resident of Malaysia. They are:

1. That the Plaintiff is residing in the United Kingdom indefinitely;

2. That the Plaintiff had permanent residency status in the United Kingdom; and

3. That the Plaintiff had exceeded the cut-off point of 6 months absence from Malaysia which is the period that determines the continuance of the status of resident of Malaysia.

In respect of the 1st ground the plaintiff said that it is not true that his stay in the United Kingdom was for an indefinite period. As a matter of fact the plaintiff had informed the defendant that his stay in the United Kingdom would cease as soon as his children completed their education in the United Kingdom. After that the plaintiff and his family would return to Malaysia permanently. Hence it was not true that the plaintiff wanted to stay permanently or for an indefinite period in the United Kingdom.

As to the 2nd ground, the counsel for the plaintiff argued that a person can have permanent residence in two countries simultaneously. The defendant had admitted that the plaintiff was a resident of Malaysia between the period 1983 and 1997 even though at the same time the plaintiff was also having permanent residence status in the United Kingdom. Therefore having permanent residence status in the United Kingdom should not be a proper yardstick to conclude that the plaintiff had ceased to be a resident of Malaysia.

With regard to the 3rd ground the counsel for the plaintiff argued that making the period of six months absence as the cut-off point to determine whether a person has ceased to be a permanent resident of Malaysia was too arbitrary and grossly unfair. The counsel for the plaintiff argued that no specific period has been stated in the Act. This indicates that the legislature did not intend to make time to be of the essence. Therefore the determination of the continuance of the status of resident of Malaysia should be decided based on the circumstances of each particular case. The learned counsel for the plaintiff gave an example of a pensioner who goes abroad on a three year course and not returning at all during that period. If the formula of being absent from Malaysia for six months is to be applied then the pensioner would be considered to have lost his status as permanent resident of Malaysia. As such to use the cut-off point of six months' absence from Malaysia is most unfair and unjust and cannot be the intention of the Legislature.

I fully agree that a case of this nature has to be decided in accordance with the circumstances and facts of the case. I also feel that it was not proper for the defendant to use six months' absence from Malaysia as the cut-off point to determine whether a person has ceased to be a permanent

resident of Malaysia. By so doing it would cause immense injustice and unfairness. In my view one of the factors that must be considered before concluding whether a person who stays away from Malaysia has ceased to be a resident of Malaysia is when he intended to remain in another country permanently. In the unreported case of *K. Thomas & Anor v. Kerajaan Malaysia* R2-25-22-1995 which was heard before me the plaintiffs had clearly stated that they went to Canada with the **intention** to stay there permanently. In that case, because of their clear intention to stay in Canada permanently, I arrived at the conclusion that they had lost their status as permanent residents of Malaysia. In my view intention of the person to stay permanently in a new country is a very important factor to determine whether he has ceased to be a permanent resident of Malaysia. In the present case, the plaintiff, on the other hand, had clearly indicated to the defendant that he had no intention to stay permanently in the United Kingdom. In his affidavit, the plaintiff said that he would return to Malaysia together with his family as soon as his two children had completed their education in the United Kingdom.

In addition to that I have also considered the special circumstances of the plaintiff's case. The plaintiff, immediately after his retirement, was asked to work in the United Kingdom for the sole purpose of safeguarding the interest of the Government of Malaysia ie, to counter the American Soyabean Association's campaign of misinformation against Malaysian palm oil. Because he was working in the United Kingdom for a reasonably long period of time his wife and children had to be with him. It would only be logical that his children would have to pursue their education in the United Kingdom. His reason to obtain a permanent residence status in the United Kingdom must have been solely to facilitate his children's education because without such status the costs of education of his children would be very expensive. However when his employment with PORIM ended in 1991 his children still had not completed their education yet. He had to continue to stay in the United Kingdom in order to enable his children to complete their education there. As a permanent resident of the United Kingdom the education fees were affordable. In my view since the plaintiff had initially stayed in the United Kingdom in order to protect Malaysian Government interest, he should not be in any way penalised for obtaining the permanent residence status in the United Kingdom and staying there for the duration of his children's education. At all times he had no intention to stay permanently in the United Kingdom. Therefore, to deprive him of his pension adjustment benefits would be very unfair and unjust. The initial reason why he was in the United Kingdom was to assist

safeguarding Malaysian Government's interest. For such good deed to the nation, the plaintiff should be rewarded and not deprived of his existing benefits as in this case.

For the reasons as I have stated above I allowed the plaintiff's application as per prayer 1 of the saman pemula. I also ordered that costs of this suit be awarded to the plaintiff.